IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 80

JOSEPH SHERMAN, *Petitioner*,

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

I. The absence of a statutory standard of proof.

1. If we understand the government's Brief, it does not defend Judge Friendly's holding that §§ 242(b)(4) and 106(a)(4) of the Immigration and Nationality Act establish *ex proprio vigore* a standard of proof which applies "to the Service" (R. 95). Such a defense would have called for a rebuttal of our demonstration (Pet. Br. 12-14) that these sections, by their language, legislative history and

administrative construction, relate to judicial review and to the quality of the evidence as distinguished from the burden of proof in the administrative proceeding. No such rebuttal is attempted. Indeed, the heading of the relevant portion of the government's argument is not that Congress has adopted Judge Friendly's, or any other, standard of proof, but merely (Gov. Br. 13) that, "A. Congress has not adopted the standard urged by petitioner." That argument is superfluous in view of our assertion (Pet. Br. 11) that, "The standard of proof in deportation cases has not been prescribed by Congress. . . ."

Moreover, the government acknowledges (Br. 13, ftn. 9) that "the statute is silent on the point" of the location of the burden of proof. It is impossible to visualize that Congress could have defined the burden of proof without saying who had to carry it.

Nevertheless, the government does assign some kind of role to § 242(b)(4). The theory seems to be that this section, though not directly applicable, exerts an atmospheric influence whereby the standard of proof, whatever it is, is not that urged by petitioners.

So the government contends that while the Act "does not expressly advert to the degree of persuasion that the factfinder must have," § 242(b)(4) "implies that the administrative factfinder must be reasonably persuaded on the basis of substantial and probative evidence that the alien is in fact deportable. Any higher standard would appear excluded by the specific provision of the Act which makes the procedure there prescribed exclusive." Gov. Br. 10-11, and see 14.

Since it is uncontested and uncontestable that § 242(b)(4) merely establishes the judicial review standard, the government is thus making the rudimentary error of supposing that the review standard establishes the maximum standard of proof at the evidentiary hearing (see Pet. Br. 12). The government forgets its prior statement (Br. 8),

"The distinction between the factfinding responsibilities of agency and reviewing court is fundamental to this case."

It is altogether irrelevant that § 242(b) provides that the "procedure prescribed" by it shall be "exclusive." Since the section says nothing about the nature or location of the administrative burden of proof, it seems probable that the standard of proof was not considered a "procedure." But if it was, there is still no standard "prescribed" by the section, and hence no statutory "exclusive" standard.

2. The government also involves section 242(b) by suggesting (Br. 16) that Congress must have had in mind that at the time the section was enacted, "it was already well established that the criminal standard of proof was not applicable in the deportation field." There are two things wrong with the suggestion.

First, at the time of enactment Congress thought that § 242(b)(4) related exclusively to the subject of judicial review. See Pet. Br. 13, quoting from S. Rep. No. 1137, 82d Cong., 2d Sess. (1952) 30. [1] Congress therefore had no occasion to contemplate the decisions relating to the standard of proof in the administrative hearing.

Secondly, there was, and still is, no "well established" body of law on the subject. The government's citations (Br. 16, ftn. 14) show this fact, consisting as they do of (1) a sentence in a dissenting opinion in a criminal case; (2) a case reversed by this Court on grounds which involved rejection of the evidentiary analysis of the Service and the Ninth Circuit; and (3) an obscure District Court case, decided in 1939, which applied the admit-

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[1] As we pointed out (Pet. Br. 13), the passage we quoted from the Senate Report differs slightly from the corresponding passage in the House Report. The government (Br. 24) quotes the text as it appears in the House Report and cites its quotation to both Reports.

tedly erroneous view that the alien has the burden of proving non-deportability. [2]

3. The government also argues (Br. 16) that the legislative adoption of administrative adjudication of deportability implies a rejection of "the stringent criminal or fraud standards of persuasion" because, "These standards are foreign to administrative proceedings and far stricter than anything known to administrative law."

In the first place, the clear and convincing standard (which the government calls the "fraud standard"[3]) is not foreign to administrative proceedings. It has been used by the Service in deportation cases where loss of citizenship is in issue. *Matter of G--- R---*, 3 I. & N. Dec. 141, 148 (1948); *Matter of Peralta*, 10 I. & N. Dec. 43 (1952). And we have no doubt that the Service would, and would be required to, do the same in determining other issues to which that standard is applied by judicial consensus.

Secondly, other types of administrative adjudication are not analogous because they do not involve the deprivation of personal liberty effected by deportation and even by the deportation proceeding itself (see Pet. Br. 19).

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[2] "The rule of proof in deportation proceedings is not proof beyond a reasonable doubt but such a hearing as will enable the alien to present his proof or evidence that he has not made himself a subject to deportation." *In re Giacobbi*, 32 F. Supp. 508, 517 (S.D. N.Y.).

[3] We must deplore this tactic. As we pointed out (Pet. Br. 16, ftn. 4), the Court has applied this standard in non-fraud cases. The standard, or an even higher one, has also been applied by other courts in a host of non-fraud civil cases, including cases involving proof of adultery, illegitimacy of a child born in wedlock, lost wills, oral contracts to make bequests, etc. See pocket-part supplement to 9 Wigmore, Evidence (3d ed.) § 2498. It may be noted that in England adultery and illegitimacy of a child born in wedlock must be proved in civil cases beyond a reasonable doubt. *Ginesi v. Ginesi*, C.A., [1948] 1 All E.R. 373; *Cotton v. Cotton*, C.A., [1954] 2 All E.R. 105; *Preston-Jones v. Preston-Jones*, H.L., [1951] 1 All E.R. 124. Accord as to illegitimacy: *Ratliff v. Ratliff*, 298 Ky. 715, 183 S.W.2d 949, 952.

4. Since Congress has not legislated a standard of proof, some other agency of government must prescribe one. The government asserts (Br. 17) that the judiciary is not a proper agency for this purpose because the fact-finding function has been confided to the administrative process. This seems a clear non-sequitur.

The government does not state who should devise the standard of proof if the judiciary does not. There can be only one other candidate for the job, the Department of Justice. Considering the impact of deportation on personal liberty, the prosecutorial role of the Department and the sad history of abuse of deportation processes, that candidate is manifestly an inappropriate selection.

II. The proper standard of proof.

Contrary to the government's belief (Br. 19-21), there would be nothing extraordinary in requiring in deportation cases, especially those involving long-time resident aliens, a higher degree of persuasion than the preponderance of the evidence. Such higher standards, including proof beyond a reasonable doubt, have been imposed in types of cases which do not involve as drastic consequences or as punitive features as deportation proceedings. See *supra*, p. 4, ftn. 3; Pet. Br. 17-19. Nor is the standard of proof in criminal cases attributable to the presence of a jury (Gov. Br. 20), since the same standard applies in criminal cases tried without a jury.

III. The standard of proof applied in this case.

The government suggests that a higher standard then preponderance was employed in this case. It states that the Attorney General "was solidly convinced, not doubtful" (Br. 10) and that he "was firmly persuaded" (Br. 13). It seems to recognize, however, that this state of mind was not reached by applying either the clear and convincing standard or the criminal standard of proof beyond a reasonable doubt (see Gov. Br. 14, 16, 18-20).

The Attorney General, of course, never personally considered this case, and the government is relying on statements of the special inquiry officer and the Board of Immigration Appeals. As the government points out (Br. 13), the special inquiry officer stated that the Service had established its case "with a solidarity *[sic]* far greater than required" (R. 70). The observation is not illuminating, since the special inquiry officer never said what degree of "solidarity" was required. Moreover, the same special inquiry officer failed to analyze or describe the deficiencies in Morrow's testimony, while observing that the undescribed "discrepancies and contradictions" in that testimony "create an aurora *[sic]* of credibility and reliability" (R. 71).

The Board of Immigration Appeals, as the government states (Br. 13), remarked that it was a "most unlikely hypothesis" that someone other than petitioner used the passport (R. 79). But the Board came to that conclusion only by first holding that "proof that the passport was used abroad raises a presumption that it was used by the person who applied for it and who is described by it" (R. 78). This presumption is not compatible with a high standard of proof. Even if it might be presumed, on the basis of common experience, that regularly issued passports are used by the citizens who obtain them, there is no such cognizable body of experience as to passports issued on fraudulent applications of non-citizens under false identities.

Respectfully submitted,

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